Supreme Court, U.S.
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No. 99-747

IN THE

Supreme Court of the United States

HAROLD LEWIS,

Petitioner,

v.

KMART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly held that Title I of the Americans with Disabilities Act of 1990 does not require a long-term disability plan to provide the same level of benefits for mental and physical disabilities.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Kmart Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. This Court's recent decision in *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), does not affect, let alone conflict with, the decision below of the United States Court of Appeals for the Fourth Circuit, or the unanimous decisions of every other circuit to address the precise issue presented in this case. Because there is no conflict between *Olmstead* and the decision below, and because there is no conflict among the circuit courts, the Petition for a Writ of Certiorari should be denied.

2. Subsequent to this Court's decision in *Olmstead*, and based entirely upon footnote ten of the majority opinion in *Olmstead*, petitioner sought a rehearing or rehearing *en banc* before the Fourth Circuit. With the benefit of the *Olmstead* decision, the Fourth Circuit summarily denied the petition for rehearing or rehearing *en banc*.

3. Contrary to petitioner's representation in his petition, no "judicial disarray" exists with respect to the issue decided by the Fourth Circuit below. Rather, every circuit to address the precise issue presented in this case has held that Title I of the ADA does not require a long-term disability plan to provide equal benefits for mental and physical benefits. *Kimber v. Thiokol Corp.*, *No.* 98-4106, 1999 U.S. App. LEXIS 29533 (10th Cir. November 12, 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

REASONS FOR DENYING THE WRIT

Petitioner's reliance on *Olmstead* for the proposition that the ADA mandates mental health parity in employee benefits, and therefore conflicts with the decision below, is misplaced since there is nothing new here, as evidenced in four different ways. First, *Olmstead* construed the express statutory and regulatory language of Title II of the ADA forbidding unjustified isolation of individuals. No such language exists in Title I of the ADA to cause it to mandate parity in benefits for mental and physical conditions. Moreover, because of its limited factual and legal inquiry, *Olmstead* did not address whether disparities in disability benefits for mental and physical long-term disability ("LTD") benefits constitute unlawful discrimination under Title I of the ADA. Second, *Olmstead* did not overrule precedent concerning benefits cases upon which the Fourth Circuit properly relied below. Third, the Fourth Circuit below properly anticipated this Court's discussion in *Olmstead*, at any rate, by specifically addressing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), upon which footnote ten of *Olmstead* relies. Finally, the recent passage of the Mental Health Parity Act (not mandating mental and physical impairment parity in the context of LTD benefits) confirms that differing benefit levels for mental and physical conditions in LTD plans is not unlawful discrimination.

In addition, petitioner's other argument that this issue raises a "vital and recurring question arising under important federal anti-discrimination statutes" is simply unavailing. To the extent the issue has arisen, the circuit courts are unanimous in declaring that the at-issue benefit differential does not constitute unlawful discrimination.

I. THIS COURT'S DECISION IN *OLMSTEAD* DOES NOT AFFECT, LET ALONE CONFLICT WITH, THE RULING BELOW.

This Court's interpretation of Title II of the ADA in *Olmstead* is inapplicable to the sole legal issue by the Fourth Circuit decided — whether the ADA mandates parity in long-term disability benefits for mental and physical disabilities. Rather, in *Olmstead*, two institutionalized mentally disabled women charged the state of Georgia with violating Title II of the ADA by maintaining them in a central mental facility although they were qualified for community based placement. This Court held that such "segregation" constituted unlawful discrimination under the ADA.

Relying exclusively on footnote ten of the majority opinion, petitioner argues that this Court's decision in *Olmstead* essentially invalidates any argument that intra-group differences in employee benefits is permissible under the ADA. Petitioner is wrong for three reasons: (1) In *Olmstead*, this Court relied on "explicit language" in Title II of the ADA forbidding "unjustified isolation" of the disabled wholly unrelated to the issue presented in this case; (2) *Olmstead* did not overrule the Court's earlier Rehabilitation Act cases involving disparity in insurance benefits, upon which the Fourth Circuit properly relied below in this Tile I ADA case; and (3) the Fourth Circuit below properly anticipated this Court's discussion in *Olmstead*, at any rate, by specifically addressing *O'Connor*, 517 U.S. 308, 312, upon which footnote ten of *Olmstead* relies.

A. The *Olmstead* Decision Construed Explicit Statutory And Regulatory Language Forbidding "Unjustified Isolation" Of The Disabled Not Present Here.

In *Olmstead*, this Court concluded that the State of Georgia discriminated against two women with mental illness in violation of Title II of the ADA by keeping them institutionalized when the state could have transferred them to a community setting. *Olmstead*, 119 S. Ct. at 2185. The Court based its holding on express statutory and regulatory language providing that "unjustified institutional isolation of persons with disabilities is a form of discrimination," *Id.* at 2187, and found it immaterial that the plaintiffs "identified . . . no similarly situated individuals given preferential treatment." *Id.* at 2186.

In dissent, Justice Thomas contended that the Court previously had "never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class." *Id.* at 2194 (Thomas, J., dissenting). The majority responded with a reference to *O'Connor*, 517 U.S. 308, a case arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA). *Olmstead*, 119 S. Ct. at 2186 n.10. *O'Connor* held that since the ADEA prohibits discrimination "because of" age, a plaintiff need not show that his replacement was outside the protected class, which is limited to those 40 years of age and over.[1]

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1. As the Court explained, "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." 517 U.S. at 313.

Petitioner argues incorrectly that this footnote should change the outcome of the instant case. It should not. Olmstead stands for the limited proposition that unnecessary institutionalization is a type of segregation, and thus is unlawful discrimination "because of" disability, much like racial segregation is race discrimination. *Id.* at 2187. The Court's decision was grounded in express language of the ADA and regulatory interpretation, none of which is present here.

Here, no such explicit language, whether in the statute or supporting agency interpretations, exists to support a similar finding with regard to the at-issue benefit distinction. Moreover, as recognized by the five circuits to have addressed this issue, relevant legislative history, Supreme Court and federal circuit court precedent addressing the Rehabilitation Act, and subsequent legislation all reinforce the conclusion that Congress never intended or considered disability insurance benefit limitations — and in particular limitations on benefits for mental/nervous conditions — to be unlawful discrimination under the ADA.

B. *Olmstead* Did Not Overrule Earlier Rehabilitation Act Cases Involving Insurance Benefits.

In the decision below, the Fourth Circuit properly noted that courts generally view the Rehabilitation Act as " 'the most appropriate starting point for [a] discussion of the ADA' " because the two statutes have the same definition of and operational language concerning disability. *Lewis v. Kmart*, 180 F.3d 166 (4th Cir. 1999), *citing*, *Rogers v. Department of Health & Envtl. Control*, 174 F.3d 431, 433 (4th Cir. 1999). Accordingly for purposes of interpreting the at-issue limitation on disability benefits, the court below

relied, in part, upon Supreme Court precedent interpreting similar provisions under the Rehabilitation Act.

This Supreme Court precedent has clearly established that benefit limitations such as the at-issue plan do *not* violate the Rehabilitation Act. *See Traynor v. Turnage*, 485 U.S. 535, 549 (1988) ("there is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons"); *Alexander v. Choate*, 469 U.S. 287 (1985). *Olmstead* did not address, much less overrule, these landmark cases upon which the Fourth Circuit properly relied.

C. The Fourth Circuit Below Anticipated The Court's Discussion In *Olmstead.*

In his petition, petitioner attempts to argue that this Court should review the Fourth Circuit's decision because the Fourth Circuit did not have the benefit of the Court's statement in *Olmstead.* However, the unanimous decision below expressly and properly anticipated the Supreme Court's discussion in *Olmstead* by discussing the language in this Court's decision in *O'Connor*, which the *Olmstead* majority cited in footnote ten. The *Lewis v. Kmart* parties not only briefed the *O'Connor* issues before the Fourth Circuit, but also orally argued its effect, if any, to the *Lewis v. Kmart* case. More importantly, the *Lewis v. Kmart* panel opinion expressly discussed *O'Connor* in the final section of its opinion and stated: "We conclude *O'Connor* is of no help to Lewis."

The panel opinion then went on to distinguish application of *O'Connor* by reference to the decision in the United States

Supreme Court in *Traynor v. Turnage*, 485 U.S. 535 (1988). In addition, the panel also offered another reason to reject reliance on *O'Connor* as applied to the *Lewis v. Kmart* case: "Second, reliance on *O'Connor* simply does not make intuitive sense." 180 F.3d at 171.

In sum, the Supreme Court's reference in *Olmstead* to *O'Connor* added no new law to the calculus affecting the Fourth Circuit's decision below. Moreover, in deciding petitioner's Petition for Rehearing or Rehearing *En Banc* to the Fourth Circuit, the entire Fourth Circuit had the benefit of this Court's decision in *Olmstead* in reaching its conclusion to let the decision below remain intact. Despite petitioner's arguments to the contrary, *Olmstead* provides no new assistance to petitioner's position.

D. The Recent Passage Of The Mental Health Parity Act Confirms That Differing Benefit Levels For Mental And Physical Conditions In Long-Term Disability Plans Is Not Unlawful Discrimination.

As the Third Circuit pointed out in *Ford v. Schering-Plough*, 145 F.3d 601, 610 (3d Cir. 1998), *cert. denied*, 142 L. Ed. 2d 704 (1999), the Sixth Circuit in *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1018 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998), and the Seventh Circuit in *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996), recent Congressional action confirms the conclusion that the ADA does not require parity in coverage for physical and mental conditions in disability plans. Congress passed the Mental Health Parity Act of 1996, 29 U.S.C. § 1185(a), in September of 1996. This statute requires parity in benefits provided in *health insurance policies*, not disability plans. Indeed, the Sixth Circuit observed in *Parker* that:

> While Congress likely realized that equality between the two types of disabilities [mental and physical] was not covered by the ADA, it sought to remedy the absence only in the context of health insurance coverage, not long-term disability policies. Thus, it appears that Congress did not believe the necessity for parity between mental and physical disabilities in long-term disability plans was sufficiently compelling to include them within the purview of the [Mental Health Parity] Act.

Parker, 121 F.3d at 1018[2]

Even in the context of health insurance coverage, however, the Mental Health Parity Act mandates only limited parity. Parity is required *only* with regard to annual and lifetime limits. Parity is *not* required with regard to the number of treatments a person is to receive or the number of office visits he or she may have. Moreover, demonstrating its extreme caution towards a parity mandate, Congress legislated that if the parity requirements increase an employer's costs by a mere one percent, parity is not required. 29 U.S.C. § 1185(a).[3]

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2. In a footnote following this conclusion, the Sixth Circuit indicated that, "[t]he converse cannot be argued: Congress did not need to include long-term disability plans in the Mental Health Parity Act because the ADA required parity in such plans. It simply cannot be the case that the ADA would cover long-term disability plans but not group health insurance plans." *Parker*, 121 F.3d at 1018 n.16.

3. Additionally, legislation was introduced in both the House and Senate last year entitled the "Substance Abuse Treatment Parity

(Cont'd)

The recent passage of the Mental Health Parity Act demonstrates two points. One, as noted in *Parker*, Congress never meant for the ADA to address the idea of parity between physical and mental benefits as additional legislative action was necessary to provide specifically defined parity requirements. As Senator Domenici, a co-sponsor of the Senate version of the Mental Health Parity Act, commented during debate, "[e]ssentially, this is a compromise to *begin* down the path [to] parity. . . ." 142 Cong. Rec. S9917 (daily ed. Sept. 5, 1996) (statement of Sen. Domenici) (emphasis added).

Two, as further noted by the Sixth Circuit in *Parker*, Congress had every opportunity to provide parity in benefits in disability plans in this legislation *recently* passed, yet declined to do so. In fact, the Act that eventually passed was initially defeated when proposed as an amendment to the Health Insurance Portability and Accountability Act of 1996, an Act designed to improve health care coverage. *See* 142 Cong. Rec. S9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Moynihan). The Seventh Circuit took note of this fact in ruling that the ADA did not require parity:

> This is a well-illustrated by the debate over a proposed amendment to the health Insurance

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(Cont'd)
Act of 1997." These bills would require parity and nondiscriminatory application of treatment limitations and financial requirements for substance abuse treatment benefits under private group and individual health plans that offer such treatment benefits in addition to medical and surgical benefits. The bills exempt employers with 50 or fewer employees. *See* S. 1147 and H.R. 2409, 105th Cong. (1997). These proposed bills further indicate that Congress does not view the ADA as mandating parity in employer provided benefits.

> Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). The amendment, which was defeated before final passage of the bill, would have required parity of coverage for mental and physical conditions. *See* 142 Cong. Rec. S9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Heflin). This debate reinforces our conclusion that the issue of parity among physical and mental health benefits is one that is still in the legislative arena.

CNA, 96 F.3d at 1044.

Clearly, Congress was not ready to mandate such additional costs that sweeping parity requirements would bring to employers at this point in time. Implicit in Congress' decision to defer passage of a comprehensive parity statute, and the forceful debate over this issue, is the clear recognition that no statute currently exists that mandates such parity in disability plans, and the only parity statute that exists renders the parity requirement inapplicable when costs become more than a *de minimis* expense for employers.

II. THE CIRCUIT COURTS ARE UNANIMOUSLY IN ACCORDANCE WITH THE DECISION BELOW.

In addition, petitioner also argues that this Court should grant review because the question presented raises a "vital and recurring" question arising under important federal anti-discrimination statutes. To the extant the question has arisen, the circuit courts have unanimously declared that the ADA does not mandate equal long-term disability benefits for mental and physical disabilities.

Five circuits courts have addressed the precise legal issue presented in this case and have all concluded that a distinction in long-term disability benefits for mental and physical disabilities does not violate the ADA. *Kimber v. Thiokol Corp.*, No. 98-4106 (10th Cir. November 12, 1999); *Lewis v. Kmart*, 180 F.3d 166 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

Moreover, the Second, Eighth and District of Columbia Circuits have also held the ADA and/or Rehabilitation Act are not violated by providing the same package of benefits to all eligible employees, so long as people with disabilities are provided with the same benefits as people without disabilities. *Castellano v. City of New York*, 142 F.3d 58, 70 (2d Cir.) (ADA and Rehabilitation Act), *cert. denied*, 119 S. Ct. 60 and 119 S. Ct. 276 (1998); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996) (ADA); *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996) (Rehabilitation Act), *cert. denied*, 117 S. Ct. 772 (1997).

There is no discordance among the circuits in resolving the precise issue presented in this case. The decision below simply conforms to the ever-growing list of circuit decisions declaring the at-issue benefit distinction to be lawful under the ADA.

CONCLUSION

For the reasons given above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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